SERVED: May 6, 1996

NTSB Order No. EA-4445

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of April, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JAMES BALFOUR COOK, Respondent.	Docket SE-14199

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on October 19, 1995, in which the law judge granted the Administrator's motion for summary judgment.[1] The law judge affirmed the

[1]The law judge's relevant conclusions, excerpted from the hearing transcript, are attached. The motion identified a number of grounds on which the Administrator believed there were no material issues of fact. The law judge rejected some of those grounds, but granted the motion based on his finding that there were no material facts in dispute regarding the Administrator's

Administrator's order revoking respondent's airman and medical certificates.[2] We deny the appeal.

On May 26, 1993, a two-count indictment was filed in the United States District Court at Tucson, AZ, charging respondent and others with conspiracy to possess with intent to distribute marijuana (the "marijuana indictment"). Respondent agreed to cooperate with prosecutors, and entered an agreement concerning the terms of that arrangement. In the key provision of that agreement, prosecutors agreed to dismiss the marijuana charges in return for respondent pleading guilty to United States Code violations involving his failure to file monetary transaction reports. Respondent cooperated with prosecutors and, among other things, provided information indicating that he had knowingly flown an aircraft with marijuana on board. There is no dispute that the other criteria of 49 U.S.C. 44710 were also satisfied.

The sole issue before us on appeal is the law judge's rejection of respondent's contention that the agreement prohibits use against him in this case of statements he made during his cooperation with the prosecution in the marijuana indictment.

(..continued)
charge that respondent had violated 49 U.S.C. 44710(b)(2). That section provides that the Administrator shall revoke an airman certificate if he finds that "(A) the individual knowingly carried out an activity punishable, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), by death or imprisonment for more than one year; (B) an aircraft was used to carry out or facilitate the activity; and (C) the individual served as an airman, or was on the aircraft, in connection with carrying out, or facilitating the carrying out of, the activity."

[2]Respondent waived application of the 60-day deadline applicable in emergency cases.

Absent use of those statements, he argues, there was insufficient evidence for the law judge to grant the motion for summary judgment on the 49 U.S.C. 44710 charge, and that using these statements violates notions of fairness and constitutional guarantees of due process.

Respondent acknowledges that other legal actions may be brought against him (Appeal at 12), but contends that these actions may not be based on the statements he confidentially made in compliance with the agreement. The Administrator does not dispute that summary judgment was granted based solely on information provided the prosecutors by respondent,[3] but replies that a reasonable reading of the agreement does not prohibit use of respondent's statements here.

The relevant paragraphs of the agreement provide as follows:

> 1. The defendant will plead guilty to a superseding information charging him with failure to file currency transaction reports. . . .
>
> 2. The parties agree that the Court and Probation Department will be informed of all criminal activity engaged in by the defendant, and that such information will be used to calculate the applicable Sentencing Guideline range. . . .
>
> 4. The Office agrees that, except as provided in paragraphs one, seven and eight, no criminal charges will be brought against the defendant for his heretofore disclosed participation in criminal activity involving monetary transactions and marijuana trafficking for the period between 1992 and May 12, 1993. Furthermore, no statements made, or actions taken, by the defendant during the course

[3]The Administrator argued, at the hearing (Tr. at 8), that he had other, independent evidence to support the section 44710 charge, but the law judge made his ruling without the benefit of that evidence.

> of this cooperation will be used against him, except as provided in paragraphs two, seven and eight.
>
> 7. The defendant must at all times give complete, truthful and accurate information and testimony, and must not commit, or attempt to commit, any further crimes. . . .
>
> 8. Any prosecution resulting from the defendant's failure to comply with the terms of this agreement may be premised upon: (a) any statements made by the defendant to the Office or to other law enforcement agents; (b) any testimony given by him before any grand jury or other tribunal, whether before or after the date this agreement is signed by the defendant; and (c) any leads derived from such statements or testimony. . . .
>
> 9. This agreement is limited to the United States Attorney's Offices for the District of Arizona and cannot bind other federal, state or local prosecuting authorities. It is further understood that this agreement does not prohibit the United States, any agency thereof, or any third party from initiating or prosecuting any civil proceedings directly or indirectly involving the defendant, including, but not limited to, proceedings by the Internal Revenue Service relating to potential civil tax liability or forfeiture of assets.

On the basis of the record and the briefs, we have concluded that the law judge should be affirmed. Respondent would have this agency conclude that, according to the principles of contract construction, the FAA may not proceed against him using certain evidence. Respondent cannot prevail on this argument, as the plea bargain, by its express terms, only limits actions of the United States Attorney's Offices for the District of Arizona.

Moreover, respondent's argument that language in paragraph 4 somehow supersedes the very definite limitations of paragraph 9 fails because the paragraph 4 language is necessarily construed with reference only to criminal prosecutions, as such is the subject, clearly defined, of that paragraph, and all other paragraphs referenced in its terms. Indeed, the only mention of

civil proceedings in the entire document is that found in paragraph 9, where it is stated that the parties understand that civil proceedings are not prohibited.

While the record below indicates that the FAA had offered additional, independent evidence of respondent's knowing air transportation of marijuana in support of the motion for summary judgment, the law judge ruled without reference to this matter. While it may have been preferable to have had this evidence considered, we find the record before us sufficient to sustain his findings.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The initial decision is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.